Supreme Court, U. S.
FILED
OCT 19 1974

IN THE

# Supreme Court of the United States

October Term, 1974
No. 74-454

RAYMOND K. PROCUNIER, Director, California Department of Corrections,

*Petitioner,*

*vs.*

CALVIN VASE VALRIE,

*Respondent.*

**Petition for Writ of Certiorari to the Supreme Court of the State of California**

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IN THE

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RAYMOND K. PROCUNIER, Director, California Department of Corrections,

*Petitioner,*

*vs.*

CALVIN VASE VALRIE,

*Respondent.*

**Petition for Writ of Certiorari to the Supreme Court of the State of California**

The petitioner Raymond K. Procunier, Director of the California Department of Corrections, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Supreme Court entered in this habeas corpus action on July 25, 1974.

## Opinions Below

The opinion of the California Supreme Court appears in Appendix A to this petition. It is reported as *In re Calvin Vase Valrie,* 12 Cal. 3d 139, 115 Cal. Rptr. 340, 524 P.2d 812 (1974). This case was an original habeas corpus proceeding in the California Supreme Court. Prior to the hearing before the California Supreme Court, the California Court of Appeal and the Superior Court for the County of Los Angeles had

denied habeas corpus relief on the identical grounds raised in the petition filed with the California Supreme Court. The lower courts did not render opinions; copies of their orders denying habeas corpus relief are reproduced in Appendices B and C.

**Jurisdiction**

The judgment of the California Supreme Court was entered on July 25, 1974. This petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

**Question Presented**

Does due process require the immediate initiation of parole revocation proceedings against a parolee charged with a new criminal offense which also constitutes a violation of his parole, or may the parole authorities detain the suspected parole violator pending the outcome of the criminal case and commence revocation proceedings upon the completion of the criminal case?

**Constitutional Provisions Involved**

United States Constitution, Amendment XIV, section 1, in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis added.)

**Statutory Provisions Involved**

California Penal Code section 3040:

"The Adult Authority shall have the power to allow prisoners imprisoned in the state prisons to go upon parole outside the prison walls and inclosures. The authority may parole prisoners in the state prisons to camps for paroled prisoners established under Article 5, Chapter 5, Title 1, Part 3 of this code. (Footnote omitted.)"

* * * *

California Penal Code section 3053:

"The Adult Authority upon granting any parole to any prisoner may also impose on the parole such conditions as it may deem proper, and shall impose as a condition of the parole, that all or a portion of his credits earned, or to be earned, may be forfeited by order of the Adult Authority in the event that such prisoner shall break his parole or violate any law of this State or rule or regulation of the prison, or of the department, the director or the Adult Authority, or any of the conditions of his parole."

* * * *

California Penal Code section 3056:

"Prisoners on parole shall remain under the legal custody of the department and shall be subject at any time to be taken back within the inclosure of the prison."

* * * *

California Penal Code section 5001:

> "The [Department of Corrections] is composed of the Director of Corrections, the Adult Authority, the California Women's Board of Terms and Parole, and the Correctional Industries Commission."

* * * *

California Penal Code section 5054:

> "The supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the director."

**Statement of the Case**

Petitioner Procunier seeks a writ of certiorari to have this Court review the decision of the California Supreme Court terminating a parole hold and restoring petitioner Calvin Vase Valrie to parole. This decision was based upon the California Supreme Court's interpretation of this Court's decision in *Morrissey v. Brewer,* 408 U.S. 471 (1972).

In the original habeas corpus proceedings before the California Supreme Court, petitioner Procunier was one of the two custodians[1] in whose name the return to

[1]Sheriff Peter Pitchess of the County of Los Angeles was the custodian named in the California Supreme Court's order to show cause. He held respondent Valrie in custody pursuant to a parole hold placed by Valrie's parole agent. Since petitioner has been restored to parole, Sheriff Pitchess no longer has custody of respondent and has accordingly been omitted from the caption of this petition. In the recent case of *In re Law,* 10 Cal. 3d 21,

the order to show cause was filed. As Director of the California Department of Corrections, petitioner Procunier had supervisory responsibility for respondent's confinement in the Los Angeles County Jail at the time the petition for writ of habeas corpus was filed in the California Supreme Court, and he has that same responsibility for respondent's present constructive custody on parole.

Insofar as the California Supreme Court's order directs the California Adult Authority to terminate its parole hold and restore respondent to parole, it should be noted that the Adult Authority is a constituent agency within the California Department of Corrections (Cal. Pen. Code § 5001) and that respondent

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24 n.2, 109 Cal. Rptr. 573, 575, 513 P.2d 621, 623 (1973), the "parole hold" concept was explained as follows:

> "A 'parole hold' occurs when a parole agent or other representative of the Authority causes a parolee to be restrained in custody independent of any action by the decision making component of the Authority. The situation occurs (1) when the parole agent believes that the parolee has violated a condition of parole, (2) when the parolee has been arrested on a new criminal charge—a prima facie violation of parole, or (3) when a parolee is completing a local jail sentence during which time the Authority may determine whether to maintain parole status in view of the conviction which resulted in the jail sentence. Common to all three situations is the power of the agent to have the parolee restrained merely by exercising his authority to take the parolee into custody and book him into a local jail or, in the event he is already in jail, prevent him from being released on bail, on his own recognizance or after the expiration of any sentence he may have been required to serve. The agent's authority to restrain the parolee stems from two sources: first, an administrative delegation of statutory power conferred on the Authority to, inter alia, 'order returned to prison any prisoner on parole. . . .' ([Cal. Pen. Code] § 3060; see also §§ 3040, 3052, and 3056) and second, the status of a parole agent as a peace officer (see [Cal. Pen. Code] § 830.5)."

Valrie has been in the ultimate custody of petitioner Procunier at all times relevant to this case.

### A. Procedural Background

On April 27, 1967, respondent Valrie was sentenced to state prison for the term of five years to life pursuant to a judgment of the Superior Court of the State of California for the County of Orange following his conviction of sale of narcotics in violation of California Health and Safety Code section 11501.[2]

On June 9, 1971, the California Adult Authority fixed respondent Valrie's term at seven years and ordered his release upon an approved parole program which included the special condition that petitioner "go to hold"[3] and complete a prior federal sentence. (Exh. 2 to Return.) Apparently respondent Valrie reverted to California parole supervision for the remainder of this term upon the expiration of his federal sentence.

On June 23, 1973, while still on California parole, respondent Valrie was arrested on federal narcotics charges. He posted $10,000 bail and was released from physical custody. He was immediately arrested by California parole authorities pursuant to California Penal Code section 3056 for suspected violation of his California parole.

On June 28, 1973, Parole Service Associate Michael Nevler visited respondent Valrie in the Los Angeles

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[2]Since the material facts were not in dispute, the California Supreme Court decided this case on the pleadings and exhibits submitted by the parties.

[3]The use of this special condition was explained and upheld in *In re Schoengarth*, 66 Cal. 2d 295, 300-01, 57 Cal. Rptr. 600, 603-04, 425 P.2d 200, 203-04 (1967).

County Jail and served him with a "Notice to Parolee in Custody Pending Prosecution." Respondent Valrie read that notice in Mr. Nevler's presence. Mr. Nevler explained to respondent that the notice meant that the Adult Authority would take no action with respect to revocation of his parole until the federal criminal proceedings pending against him were completed. Respondent Valrie refused to sign an acknowledgment of receipt of the Adult Authority notice.

When bail was set, on June 23, 1973, the federal magistrate also scheduled a preliminary hearing for July 5, 1973. On that date, however, an indictment by a federal grand jury was filed charging petitioner and five codefendants with the crimes of (1) conspiracy to possess and distribute a narcotic, drug/controlled substance in violation of 21 United States Code section 846 and (2) possession with intent to distribute a narcotic drug/controlled substance (cocaine) in violation of 21 United States Code section 841(a)(1). Respondent was charged with one count of conspiracy and two counts of possession with intent to distribute. Due to the filing of the indictment, no preliminary hearing was held. Respondent Valrie was continuously held in custody under a California parole hold from June 23, 1973, when he was arrested for suspected violation of his parole, until April of 1974, when the federal criminal charges were dismissed. Respondent Valrie is still on California parole and will not be eligible for discharge until June 12, 1977.

**B. How the Federal Question Arose**

The single federal question presented in this petition was considered on the merits and decided adversely to petitioner by the California Supreme Court in the opin-

ion filed by that court. Since the question presented was passed upon by California's highest court, there is no preliminary issue as to the proper presentation of the federal claim in the California courts.

The California Supreme Court's opinion demonstrates quite clearly that the question raised in this petition was both considered and decided:

> "We issued an order to the Sheriff of the County of Los Angeles directing that he show cause why the petitioner, a California parolee, should not be relieved of a 'parole hold' (Pen. Code, § 3060) following his indictment and arrest by federal authorities for narcotic violations. The People contend that the prerevocation hearing mandated in Morrissey v. Brewer, (1972) 408 U.S. 471 [33 L.Ed.2d 484, 92 S. Ct. 2593] (see also People v. Vickers, (1972) 8 Cal.3d 451 [105 Cal. Rptr. 305, 503 P.2d 1313]) is inapplicable to individuals on parole who are charged with the commission of a criminal offense. We reject this contention and as petitioner has not been accorded the protections required by Morrissey, he is entitled to the relief hereinafter provided." *In re Valrie*, 12 Cal. 3d 139, 141, 115 Cal. Rptr. 340, 341, 524 P.2d 812, 813 (1974).

## REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

### I

### This Case Presents an Important Constitutional Question Regarding the Proper Application of Morrissey v. Brewer Standards to Parolees Charged With New Criminal Offenses Which Also Constitute Parole Violations if Proved

In *Morrissey v. Brewer*, 408 U.S. 471 (1972), this Court announced the minimum due process standards which govern the revocation of parole by state authorities. The two Iowa parolees in that case were charged with violations of parole that did not amount to new criminal offenses. Hence this Court did not have occasion to pass upon the due process procedures mandated when the parolee is charged with a new crime that also constitutes a prima facie violation of his parole. Unlike the parolees in *Morrissey*, the parolee charged with a new crime is entitled to a jury trial on the new criminal charge in all California felony and misdemeanor cases. Petitioner submits that due process does not require a duplicative set of administrative hearings to be held concurrently with the criminal proceedings in order to establish probable cause to believe that parole has been violated. Yet the California Supreme Court has mandated precisely such a duplicative set of hearings under its interpretation of this Court's decision in *Morrissey v. Brewer, supra*. Since a substantial proportion of parolees returned to prison for parole violations are parolees who have committed new crimes,[4] the California Supreme Court's erroneous

[4]In calendar year 1973, of 3152 male felon parolees returned to state prison for violation of parole, 910 were returned because

(This footnote is continued on next page)

interpretation of *Morrissey* casts a heavy administrative burden of unnecessary hearings on the California Adult Authority and presents a due process question of considerable importance.

Petitioner Procunier submits that an immediate prerevocation hearing is not required by *Morrissey v. Brewer,* 408 U.S. 471 (1972), and would be contrary to sound public policy. There is no language in the *Morrissey v. Brewer* opinion to suggest that an immediate parole hearing is mandated where parole violation charges stem from the alleged commission of a new criminal offense, either federal or state. *Morrissey* did not involve that factual situation. Chief Justice Burger's opinion for the Court does state, however, that:

> ". . . Obviously a parolee cannot relitigate issues determined against him in other forums, as in the situation presented when the revocation is based on conviction of another crime." (408 U.S. at 490.)

This language of the majority opinion contains an implicit recognition of the parole board's right to await the outcome of pending court proceedings prior to makings its own appraisal of the merits of the parole violation charges. The Court clearly does not intend to require duplicative hearings before both the court and the parole authority each time a parolee is charged with a new offense. Indeed, the parolee only stands to

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of new California felony convictions. In calendar year 1972, of 3087 male felon parolees returned to prison, 1006 were returned because of new California felony convictions. ("Movement of Male Felon Parolees—Quarterly and Calendar Year Cumulative Report through December, 1973," California Department of Corrections, 1974.) These statistics do not reflect the additional substantial number of parolees whose revocation of parole was based upon local, non-felony convictions or upon convictions of violation of federal offenses.

benefit by having an adjudication of the new criminal charges in the courts prior to parole board action. *Morrissey* expressly recognizes that a parolee is not entitled to the full panoply of rights accorded to a criminal defendant when he is given a parole revocation hearing. (408 U.S. at 480.) By allowing the Adult Authority to postpone its hearing until after the courts have ruled, the parolee receives his first hearing in a forum that accords him the expanded procedural rights associated with a criminal trial, *e.g.*, counsel, compulsory process, proof beyond a reasonable doubt, etc.

Thus, petitioner contends that *Morrissey* is fully consistent with the position taken by the Court of Appeals for the Tenth Circuit in *Small v. United States Parole Board,* 421 F.2d 1388 (10th Cir.) *cert. denied,* 397 U.S. 1079 (1970). There a federal parolee claimed that he was entitled to an immediate hearing on parole violation charges after being taken into state custody on a charge of aggravated robbery. The Tenth Circuit rejected this claim, stating:

> "An immediate parole hearing is requested by Small. To have the parole violation established by a judicial determination of guilt or innocence rather than by an informal board hearing is the better procedure. Shelton v. United States Board of Parole, 128 U.S.App. D.C. 311, 388 F.2d 567 (1967); Agresti v. Parker, 285 F.Supp. 893 (M.D. Pa. 1968). The board is free to await the outcome of criminal charges though they are taking a calculated risk, in the event of an acquittal, if after this delay they subsequently desire to proceed on the charge not based on pending criminal proceedings." (*Id.* at 1389.)

Prior to the instant case, California had also recognized that "To allow inquiry into the merits of a charge of parole violation pending the hearing of a criminal case would produce a chaotic situation." *In re Cleaver*, 266 Cal. App. 2d 143, 158, 72 Cal. Rptr. 20 (1968). Although the *Cleaver* case involved a habeas corpus inquiry into the merits of the parole violation charge, the rationale of the case seems to apply with equal force to the situation where there might be concurrent proceedings in the original courts and before the Adult Authority. A due process policy of permitting the parole authority to await the outcome of court proceedings before conducting a revocation hearing would serve to avoid situations where the parole authority and the courts may reach conflicting and contrary conclusions as to the merits of the new criminal charges. It also prevents competition between the parole board and the prosecutor over which agency has priority in use of witnesses and evidence in its proceeding.

An analysis of the potential scope of any prerevocation hearing held contemporaneously with a criminal trial strongly militates in favor of permitting the parole authority to await the outcome of the criminal proceedings before it commences the criminal process. Since it is settled in California that an arrest on a new criminal charge is a prima facie violation of parole (*In re Law, supra*, 10 Cal. 3d at 24 n.2, 109 Cal. Rptr. at 575, 513 P.2d at 623), it would appear that the parole agent might establish probable cause for suspension of parole by merely introducing a certified copy of the misdemeanor or felony complaint or the information or indictment at the prerevocation hearing. If, however, a certified copy of the official accusation were insufficient to establish probable cause, then this Court would in

effect require the parole agent, a layman, to put on the evidence establishing the elements of the criminal offense in much the same way as a state or federal prosecutor would present that evidence at a preliminary hearing or trial on a criminal charge. Such a requirement would be beyond the competence of the typical parole agent who is not trained to try criminal cases. Under the circumstances of the present case, the parole agent would be expected to establish that respondent Valrie was part of a narcotics conspiracy in violation of federal law. Since conspiracy cases are among the most difficult cases to try even when handled by experienced members of the criminal bar, it is readily apparent that the trial of such charges at a *Morrissey* preliminary hearing would be beyond the capabilities of the lay persons who are normally expected to handle those proceedings.

Moreover, such a requirement squarely conflicts with the dictate of *Morrissey* that these hearings are to be informal. (408 U.S. at 487.) The *Morrissey* decision states that ". . . the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations." (408 U.S. at 480.) The inclusion of such language in the *Morrissey* opinion is a clear indication that this Court did not intend to have parole agents conduct mini-trials on the criminal charges in order to satisfy the preliminary hearing requirement enunciated in that case.

The recent California Court of Appeal decision in *In re Edge*, 33 Cal. App. 3d 149, 108 Cal. Rptr. 757 (1973), cogently puts the case for allowing the Adult Authority to await the outcome of criminal proceed-

ings before commencing the revocation process. The Court of Appeal observes:

> "When a parolee is arrested and prosecuted on criminal charges, the criminal prosecution itself is adequate protection against the evils and dangers Morrissey was designed to protect against. An indictment or a preliminary hearing in criminal proceedings meets all the requirements of Morrissey. If the preliminary hearing is waived and the parolee pleads guilty or is found guilty after trial, conviction of crime by a court under the stringent standards of proof, stricter procedural requirements, and the antiseptic atmosphere of the courtroom afford the parolee far more protection than do the preliminary hearing procedures announced in Morrissey. If the parolee was convicted of a crime forming the basis of the revocation proceedings, there was obviously probable cause to hold him for a parole violation. (See In re Scott (1973) 32 Cal. App. 3d 124 [108 Cal. Rptr. 49].)" (33 Cal. App. 3d at 158, 108 Cal. Rptr. at p. 764.)

The fact that there may be a substantial lapse of time from the parolee's arrest on a new criminal charge until the ultimate disposition of the charge in the courts does not conflict with the language of *Morrissey* requiring the probable cause hearing to be conducted "as promptly as convenient after arrest while information is fresh and sources are available." (408 U.S. at 485.) It must be remembered that this Court employed that phraseology in a case where the petitioners were not charged with new crimes but were merely charged with violations of their conditions of parole. Under the Sixth Amendment, the parolee charged with a new

crime must be afforded a trial in the district "wherein the crime shall have been committed. . . ." Regardless of how long the criminal trial may take, this parolee's protection is his right to speedy trial under the Sixth Amendment to the United States Constitution. If the parolee is convicted of the new offense, his right to speedy trial has ensured that the evidence leading to his conviction was introduced "while the information was fresh and sources are available." If the parolee is acquitted or his case is dismissed for any reason, the conduct of a prerevocation hearing on technical charges at that point would not violate his right to a prompt hearing any more than the trial of a defendant on a second criminal charge committed in a second county violates that defendant's right to speedy trial when the second trial commences at the conclusion of the first. No one could reasonably expect two prosecutors to conduct concurrent trials in two different counties in order to satisfy the speedy trial rights of a defendant who commits multiple crimes.

Indeed, to require the parole board to hold an immediate prerevocation hearing might be prejudicial to the defendant's rights at his criminal trial. If he were required to defend against the parole violation charge prior to his criminal trial, he might be forced to disclose his defense in the administrative proceeding to his later detriment at trial. At least one case has suggested that due process might not be observed if an accused person is subjected to an administrative hearing on a serious criminal charge that is pending against him in a court of law. *See Silver v. McCamey*, 221 F.2d 873, 874-75 (D.C. Cir. 1955).

In summary, petitioner submits that the *Morrissey v. Brewer* opinion did not purport to deal with the

procedures required by due process where a parolee is facing new criminal charges in the courts. Since the paroles in *Morrissey* were revoked on non-criminal violation charges, this case presents an important issue of first impression which this Court should hear and decide.

II

**This Case Is Not Moot Because of the Dismissal of Federal Charges Against Respondent Valrie**

Petitioner anticipates that respondent Valrie will urge in opposition to this position that the case has now become moot by virtue of the dismissal of the federal charges against him. Petitioner submits, however, this case falls with the classic exception to the doctrine of mootness in that the issue raised in this petition is one "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498, 515 (1911). *See also Super Tire Engineering Co. v. McCorkle*, .... U.S. ...., 94 S. Ct. 1694, 1700 (1974); *Roe v. Wade*, 410 U.S. 127 (1973). In every case, it may be expected that appellate litigation of a parolee's right to an immediate prerevocation hearing may outlast the pendency of his criminal trial (especially if the Sixth Amendment guarantee of a speedy trial is enforced). Thus, this Court has held that it is sufficient that the litigant show the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest. *Super Tire Engineering Co. v. McCorkle, supra*, 94 S. Ct. at 1700. The California Supreme Court's decision establishes the existence of an immediate and definite governmental policy that adversely affects the administrative burden of the California Adult Authority and the California Department of Corrections. In-

deed, any assertion of mootness by respondent Valrie appears to be answered by the following language from this Court's recent decision in *Richardson v. Ramirez*, .... U.S. ...., 94 S. Ct. 2655, 2662 (1974):

> ". . . While the situation in Moore v. Ogilvie, supra, was described as 'capable of repetition, yet evading review,' 394 U.S., at 816, 89 S.Ct., at 1494, that involved here can best be described, in the view of the Supreme Court of California's decision against the state officials and their obligation to follow the law as laid down by that court, as 'incapable of repetition,' and therefore evading review. There are thus the strongest sort of practical arguments, as well as the language of Moore v. Ogilvie, supra, which militate against a conclusion of mootness in this case."

**Conclusion**

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of California.

Respectfully submitted,

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## APPENDIX A.

[Crim. No. 17113, In Bank. July 25, 1974.]

IN re CALVIN VASE VALRIE on Habeas Corpus.

COUNSEL

Victor Sherman and Nasatir, Sherman & Hirsch for Petitioner.

Evelle J. Younger, Attorney General, Edward A. Hinz, Jr., Chief Assistant Attorney General, Doris H. Maier, S. Clark Moore, Assistant Attorneys General, and Russell Iungerich, Deputy Attorney General, for Respondent.

OPINION

Wright, C. J.—We issued an order to the Sheriff of the County of Los Angeles directing that he show cause why the petitioner, a California parolee, should not be relieved of a "parole hold" (Pen. Code, § 3060) following his indictment and arrest by federal authorities for narcotic violations. The People contend that the prerevocation hearing mandate in *Morrissey v. Brewer* (1972) 408 U.S. 471 [33 L.Ed.2d 484, 92 S.Ct. 2593] (See also *People v. Vickers* (1972) 8 Cal.3d 451 [105 Cal.Rptr. 305, 503 P.2d 1313]) is inapplicable to individuals on parole who are charged with the commission of a criminal offense. We reject this contention and as petitioner has not been accorded the protections required by *Morrisey,* he is entitled to the relief hereinafter provided.

Petitioner was convicted in 1967 following his plea of guilty to a narcotics violation (Health & Saf. Code, § 11501) and was sentenced to state prison. Petitioner's five years to life sentence was fixed by the Adult Authority (Authority) in 1971 at seven years,

and he was released on parole on condition, among others, that he "go to hold" to complete a prior federal sentence. (See *In re Schoengarth* (1967) 66 Cal. 2d 295, 300-301 [57 Cal.Rptr. 600, 425 P.2d 200].) Petitioner apparently reverted to California parole status after satisfying the federal restraint.

While still on California parole petitioner was again arrested on federal narcotic charges on June 23, 1973. Bail in the amount of $10,000 was posted and he was released from federal custody on June 25. He was immediately arrested by California authorities on suspicion of a violation of parole. (Pen. Code, § 3056.)

The federal authorities first set a preliminary hearing in the new criminal proceedings for July 5. On that date, however, an indictment was returned by a grand jury which met in secret with no court reporter and the preliminary hearing was taken off calendar. The Attorney General acknowledged at the oral argument before this court that petitioner has continually been held without further proceedings of any type pursuant to the parole hold pending trial on the federal charges which was scheduled for April 1974.[1] On September 9, 1973, we denied petitioner's application for bail pending determination of the validity of the parole hold. (*In re Law* (1973) 10 Cal.3d 21 [109 Cal.Rptr. 573, 513 P.2d 621].)

(1) Petitioner complains that he has been denied the prerevocation hearing mandated by *Morrissey* in the case of a parolee arrested on suspicion of a prole violation. In setting forth minimal due process requirements the Supreme Court viewed parole revocation as

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[1]We have since been advised that the criminal charges were dismissed in April 1974.

a two-step procedure—"an initial determination that there exists or do not exist grounds which may support revocation thus justifying a temporary detention pending formal revocation proceedings, and the more formal proceedings requiring factual determinations and disposition based thereon." (*People v. Vickers, supra,* 8 Cal.3d 451, 456.) The initial proceedings, here termed a prerevocation hearing, are compelled because "due process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and *as promptly as convenient after arrest while information is fresh and sources are failable.*" (*Morrissey v. Brewer, supra,* 408 U.S. 471, 485 [33 L.Ed.2d 484, 496]; italics added.)[2] At the time of petitioner's arrest for the alleged parole violation his counsel requested in petitioner's behalf a *Morrissey* prerevocation hearing and, when the request was not granted, filed a timely application for the instant writ relief.

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[2]Our inquiry here deals with the complete failure of a timely or any prerevocation hearing. Not of immediate concern is the nature of hearing mandated by *Morrissey*. In *Vickers* we described the hearing in the following language. "The determination [of cause to hold for a formal hearing] need not be made by a judicial officer, but could be made by some qualified person such as a parole officer who was not directly involved in the case. The initial hearing need not be formal, but the parolee must be given notice of the time, place and purpose thereof, and of the alleged parole violations. At the hearing the parolee is entitled to appear and speak personally in his own behalf, and bring and present letters, documents and other persons who can give relevant information to the hearing officer. Adverse witnesses are to be made available for questioning by the parolee except when the hearing officer determines that an informant would be subject to risk of harm if his identity were disclosed. The hearing officer must make a summary or digest of the proceedings and must determine if there exists probable cause to hold the parolee for revocation proceedings against him." (*People v. Vickers, supra,* 8 Cal.3d 451, 456-457.)

(2) The People contend that notwithstanding the long and continuing delay there has been no failure to comply with the mandate to make the prerevocation determination "as promptly as convenient after arrest." In fact, the People contend that the hearing may be delayed during such time as federal criminal proceedings are pending, whatever the length of time may be involved.

The People's position is predicated on a claim that *Morrissey* is inapplicable when the alleged parole violation is also charged as a new criminal offense, either by federal or state authorities. *Morrissey* itself dealt with conduct which consisted only of alleged parole violations. The opinion does not expressly provide that it is or is not applicable in instances wherein the alleged parole violation is also charged as a new crime. However, the court made reference to such circumstances when it stated: "Obviously a parolee cannot relitigate issues determined against him in other forums, as in the situation presented when the revocation is based on conviction of another crime." (*Id.*, at p. 490 [33 L.Ed.2d at p. 499].) The People seize upon this language as meaning that if the alleged violation is also charged as a crime there is no compulsion to determine the question of the violation until the question of conviction has been litigated.

The *Morrissey* language lends itself to several interpretations other than that urged by the People. It appears evident that because the United States Supreme Court expressly purports to state what it deems to be

the obvious, it did not intend to announce in a casual manner a concept as basic as that claimed by the People. Surely, if the court intended to limit the application of its opinion to hearings on violations not also charged as crimes, it would not only have expressly so stated but would also have given reasons for the different treatment in the t[illegible] situations.

We have had occasion to review and consider the application of *Morrissey* in the context of criminal violations. In the case of *In re Law, supra,* 10 Cal.3d 21 we recognized the applicability of *Morrissey* in the following language: "Although the question was not directly raised whether, in a case where a parolee is arrested by reason of the alleged commission of a new criminal offense, the preliminary hearing provided for in our Penal Code in the case of a felony (see §§ 859-883) or the trial itself in the case of a misdemeanor may also serve as the probable cause hearing mandated by *Morrissey v. Brewer, supra,* 408 U.S. 471, we nevertheless deem it appropriate to consider the same. . . ." (*Id.* at p. 26.) We concluded in *Law* that "the procedures afforded through the holding of a preliminary hearing are inclusive of or may be made to conform to the proceedings mandated in *Morrissey*. . . . In such instance no purpose would be served by requiring a determination that there exists probable cause to believe that a particular act occurred which constitutes a violation of parole independently of a prior determination of the existence of probable cause of the commission of a felony grounded on the same occurrence."

(*Id.*, at p. 27.) It thus appears that the determination at a preliminary hearing may well be the very type of determination to which the high court had reference when it stated that a parolee may not relitigate, within the context of *Morrissey* proceedings, "issues determined against him in other forums." Such a construction of the critical language in *Morrissey* precludes the meaning urged bythe People.[3]

*Law* also notes with concern the untimely delay which might result when misdemeanor proceedings are utilized to serve both criminal and *Morrissey* purposes. "First, absent waiver or defense delay, trial on a misdemeanor may be postponed as long as 30 to 45 days. . . . (§ 1382, subd. 3.) We do not herein adhere to the view that in cases where there has been a substantial lapse of time from arrest to disposition that the mandate of *Morrissey* to the effect that the probable cause hearing be conducted 'as promptly as convenient after arrest while information is fresh and sources are available' . . . has been satisfied." (*Id.*, at p. 28.) In the instant case, as we have been, there has already been considerably more delay than that contemplated in *Law* when misdemeanor proceedings are relied upon to meet *Morrissey* demands.[4]

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[3]Although the United States Supreme Court has not spoken directly to the issue it may be deemed to have recognized, as we did in *Law*, that due process requires the same protections for a parolee or probationer in revocation proceedings without regard to whether the alleged violations are also charged as new crimes. Thus in *Gagnon v. Scarpelli* (1973) 411 U.S. 778 [36 L.Ed.2d 656, 93 S.Ct. 1756], a probationer charged with violations of probation which included an arrest for burglary was held to be entitled to both hearings prescribed in *Morrissey*. (*Id.*, at pp. 780, 791 [36 L.Ed.2d at pp. 660, 666-667].)

[4]The instant case is otherwise illustrative of the likelihood of serious denials which could result had we adopted the People's contention. Almost 10 months elapsed before federal charges

The People's reliance on pre-*Morrissey* cases (*Small v. United States Board of Parole* (10th Cir. 1970) 421 F.2d 1388; *In re Payton* (1946) 28 Cal.2d 194 [169 P.2d 361]; *In re Etie* (1946) 27 Cal.2d 753 [167 P.2d 203]; *In re Cleaver* (1968) 266 Cal.App.2d 143 [72 Cal.Rptr. 20]) is unavailing. They also rely on language appearing in the case of *In re Edge* (1973) 33 Cal.App.3d 149 [108 Cal.Rptr. 757]. There, however, parole violations based on criminal conduct were not charged until *after* the criminal proceedings had been completed and convictions secured, and the language relied on is thus inapposite. Nothing said in that case is inconsistent with the views expressed herein.

Petitioner has established that he has been denied *Morrissey* protections. He has, moreover, preserved his right to a prerevocation hearing by making a timely request therefor and by seeking timely relief pursuant to his instant application for the writ. (See *In re La Croix, post,* p. 155, fn. 7 [..... Cal.Rptr. ....., ..... P.2d .....].) The parole hold, accordingly, must be terminated and petitioner must be restored to the same parole status prevailing prior to the conduct currently charged as parole violations.

It does not necessarily follow that because petitioner is restored to parole the Authority cannot again charge him with parole violations based on the identical course of conduct which caused the parole hold to be placed against him and thereafter attempt to effect a revocation of parole in accordance with the mandates of *Morrissey*

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were dismissed without a determination of any of the substantive issues relevant to either the prerevocation or revocation hearings mandated by *Morrissey*. During all this period petitioner was subjected to a parole hold and his status as a parolee, insofar as we are informed, remained unresolved.

and its progeny.[5] In countering the assertion of such belated charges, however, petitioner may additionally defend on the ground that untimely delays between the dates of the alleged misconduct and any hearings thereon deprived him of a fair opportunity to acquit himself of the charges, resulted in prejudice to him and thus deprived him of procedural due process. (See *Morrissey v. Brewer, supra,* 408 U.S. 471, 485; *In re La Croix, supra, post,* p. 146.)

The Adult Authority is ordered to terminate its parole hold and restore petitioner to parole as herein provided. Except to the extent that the relief prayed for has been accorded to petitioner the order to show cause is discharged and the petition for writ of habeas corpus is denied.

McComb, J., Tobriner, J., Sullivan, J., Clark, J., and Files, J.,* concurred.

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[5]We draw upon the analogy of rules relating to requirements for a speedy trial. (See *In re La Croix, supra, post,* p. 146.) When a defendant is discharged and an information dismissed for want of a speedy trial, such dismissal is not a bar to a subsequent prosecution under a new information charging the same offense based on the same course of criminal conduct. (*People v. Dawson* (1930) 210 Cal. 366, 369 [292 P. 267]; *In re Begerow* (1902) 136 Cal. 293 [68 P. 773]; *People v. Nelson* (1964) 228 Cal.App.2d 135, 138 [39 Cal.Rptr. 238].)

*Assigned by the Chairman of the Judicial Council.

## APPENDIX B.

### Order.

In the Court of Appeal of the State of California, Second Appellate District, Division Three.

In re Calvin Vase Valrie, on Habeas Corpus. 2d Crim. No. 23760.

Filed: July 31, 1973.

THE COURT:

The request for Immediate Determination filed in the above matter on July 26, 1973, has been read and considered, and good cause appearing therefor, the petition for a writ of habeas corpus herein is denied. *In re Edge*, 33 Cal.App.3d 149, 158.

The Order of this court dated July 19, 1973 is hereby vacated.

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Date July 6, 1973 DEPT. [illegible]
HONORABLE [illegible] JUDGE J. Shepard Deputy Clerk
[illegible] Deputy Sheriff E. Arejo Reporter

DOCKET ORDER
No. 73-11178
Entered by cl
Date 7-11-73

CASE NO. SA [illegible] (Parties and counsel checked if present)

PEOPLE OF THE STATE OF CALIFORNIA
VS
01-VAIRS, CALVIN VASE

Counsel for People
DEPUTY DISTRICT ATTY R.Ruth
Counsel for Defendant
V. Sherman

MINUTES ENTERED
7-6-73

CHARGE

NATURE OF PROCEEDINGS HC

(BOX CHECKED IF ORDER APPLICABLE)

101 ☒ Hearing resumed, appearance for attorney General
102 ☐ PUBLIC DEFENDER APPOINTED. D.P.D. BEING PRESENT
103 ☐ ON MOTION OF DEFENDANT RELIEVED AND ... IS SUBSTITUTED AS ATTORNEY OF RECORD
104 ☐ ON MOTION FURTHER PROCEEDINGS CONTINUED TO ... AT ... A.M. IN DEPT ... ☐ NON-APPEARANCE CALENDAR
105 ☐ SUPPLEMENTAL PROBATION REPORT IS ORDERED
106 ☐ DEFENDANT IS FOUND TO BE / NOT TO BE IN VIOLATION OF PROBATION
107 ☐ PROBATION IS REVOKED / REMAINS REVOKED. SENTENCE IMPOSED AS FOLLOWS:
108 ☐ PROBATION REINSTATED / CONTINUED ON ORIGINAL TERMS AND CONDITIONS. EXCEPT FOR MODIFICATION THAT
109 ☐ SENTENCE / COUNTS TO RUN CONSECUTIVELY / CONCURRENTLY WITH
110 ☐ PURSUANT TO SEC. 17 PENAL CODE, OFFENSE IS DEEMED TO BE A MISDEMEANOR.
111 ☐ DEFENDANT IS SENTENCED TO ... COUNTY JAIL. SENTENCE IS SUSPENDED
112 ☐ PROBATION IS ORDERED TERMINATED PURSUANT TO SEC. 1203.3 PENAL CODE.
113 ☐ PLEA OF GUILTY OR CONVICTION IS SET ASIDE, A PLEA OF NOT GUILTY IS ENTERED. CASE IS DISMISSED PURSUANT TO SEC. 1203.4 PENAL CODE.

PAYMENT OF DOCTORS/ATTORNEYS

114 ☐ THE COURT HAVING APPOINTED ... PURSUANT TO SECTION(S) ... AND SAID SERVICE HAVING BEEN RENDERED/COMPLETED ON ... COURT FINDS THAT $ ... IS A REASONABLE SUM FOR COMPENSATION AND NECESSARY EXPENSES AND ORDERS A WARRANT BE DRAWN BY THE AUDITOR ON THE TREASURER FOR SAID SUM IN FAVOR OF
NAME:
ADDRESS:
CITY, STATE, ZIP:

115 ☑ THE COURT HAVING APPOINTED ... PURSUANT TO SECTION(S) ... AND SAID SERVICE HAVING BEEN RENDERED/COMPLETED ON ... COURT FINDS THAT $ ... IS A REASONABLE SUM FOR COMPENSATION AND NECESSARY EXPENSES AND ORDERS A WARRANT BE DRAWN BY THE AUDITOR ON THE TREASURER FOR SAID SUM IN FAVOR OF
NAME:
ADDRESS:
CITY, STATE, ZIP:

116 ☐ REFERRAL TO DEPARTMENT 95 PURSUANT TO SECTION 3051 WELFARE AND INSTITUTIONS CODE CRIMINAL PROCEEDINGS SUSPENDED. PETITION ORDERED FILED IN DEPARTMENT 95 PURSUANT TO SEC. 3051 WELFARE AND INSTITUTIONS CODE. IN ORDER THAT AN EXAMINATION AND HEARING MAY BE HAD TO DETERMINE WHETHER DEFENDANT IS ADDICTED TO THE USE OF NARCOTIC DRUGS OR BY REASON OF REPEATED USE OF NARCOTICS IS IN IMMINENT DANGER OF BECOMING SO ADDICTED, AND DEFENDANT IS REMANDED TO CUSTODY OF THE SHERIFF OF LOS ANGELES COUNTY PENDING FURTHER ORDER OF DEPARTMENT 95.
117 ☐ FURTHER PROCEEDINGS CONTINUED TO ... AT ... A.M. IN DEPT.

MENTALLY DISORDERED SEX OFFENDER PROCEEDINGS

118 ☐ CRIMINAL PROCEEDINGS SUSPENDED. COURT INSTITUTES M.D.S.O. PROCEEDINGS.
119 ☐ DEFENDANT WAIVES / SERVED WRITTEN CERTIFICATION RE M.D.S.O. PROCEEDINGS.
120 ☐ PURSUANT SEC. 6307 WEL. & INST. CODE, COURT APPOINTS DR. ... AND DR. ... TO EXAMINE DEFENDANT
121 ☐ SUPPLEMENTAL PROBATION REPORT ORDERED.
122 ☐ HEARING RE M.D.S.O. PROCEEDINGS, FURTHER CRIMINAL PROCEEDINGS CONTINUED TO ... AT ... A.M.
123 ☒ COURT ADVISES DEFENDANT OF HIS APPEAL RIGHTS.
124 ☒ FURTHER ORDERS AS FOLLOWS:
Defendant's petition for Writ of Habeas Corpus denied.
Copy of this minute order to be sent to the attorney General's office.

125 ☐ DEFENDANT FAILS TO APPEAR WITH/WITHOUT SUFFICIENT EXCUSE. BAIL FORFEITED/OWN RECOGNIZANCE REVOKED
126 ☐ BENCH WARRANT ORDERED ISSUED/HELD UNTIL ...
127 ☐ NO BAIL/BAIL FIXED AT $ ...

☒ REMANDED ☐ BAIL ☐ O.R. ☐ RELEASED ☐ DISCHARGED ☐ BAIL EXONERATED

MINUTE ORDER Date: 7-6-73 4 MISC.